

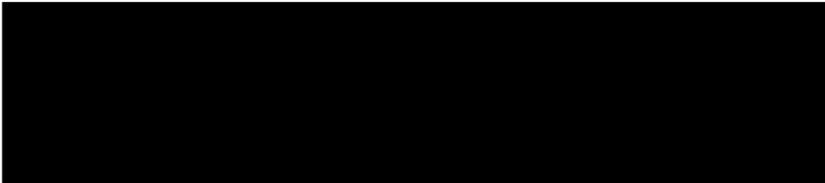
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U.S. Department of Homeland Security
20 Mass Ave., N.W., Rm. 3000
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U.S. Citizenship
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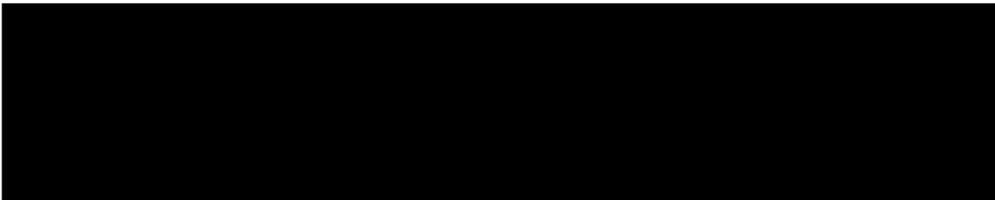
FILE: WAC 05 182 50966 Office: CALIFORNIA SERVICE CENTER Date: **AUG 09 2007**

IN RE: Petitioner:
Beneficiary:



PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The director of the service center denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a software consulting and development business that seeks to employ the beneficiary as a systems analyst. It states that it employs 20 personnel and had a gross annual income of \$3 million when the petition was filed. The petitioner, therefore, endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation; (2) the director's request for evidence; (3) counsel's response to the director's request; (4) the director's denial letter; and (5) the Form I-290B. The AAO reviewed the record in its entirety before reaching its decision.

The director denied the petition determining that the petitioner had not established that it qualified as the beneficiary's U.S. employer and had not provided end contracts and a complete itinerary for the beneficiary. The director concluded that the petitioner had not established that it had a specialty occupation position available for the beneficiary in the location identified on the Form ETA 9035, Labor Condition Application (LCA).

On the I-290B, signed by counsel on March 6, 2006, counsel stated:

All requested documentation and evidence was submitted. The adjudicating officer erred in its denial pursuant to AAO holdings. The petitioning employer at all times controlled the H1B1 employee.

Counsel checked the block indicating that he would be sending a brief and/or evidence to the AAO within 30 days. The AAO sent a fax to counsel on June 6, 2007, informing counsel that no separate brief and/or evidence was received, to confirm whether or not he had sent anything else in this matter, and as a courtesy, providing him with five days to respond. However, counsel did not respond and no further documents have been received by the AAO to date. The record is considered complete.

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

(A) theoretical and practical application of a body of highly specialized knowledge, and

(B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(ii):

Specialty occupation means an occupation which requires theoretical and practical application of a body of highly specialized knowledge in field of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

Citizenship and Immigration Services (CIS) interprets the term “degree” in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

Pursuant to 8 C.F.R. § 214.2(h)(4)(ii), *United States employer* means a person, firm, corporation, contractor, or other association, or organization in the United States which:

- (1) Engages a person to work within the United States;
- (2) Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee; and
- (3) Has an Internal Revenue Service Tax identification number.

In a June 15, 2005 letter submitted in support of the petition, the petitioner provided the following description of the proposed duties:

Analysis, design, development, documentation, and implementation of software systems; performance of testing and quality assurances regarding the implementation of the systems thereby meeting the needs of the client. Gather data from clients and prepare software requirements and specifications; prepare flow charts; web integration; design and develop commercial client/server applications as well as perform full life cycle development. Participate in system and database design meetings and provide training, support, and documentation in the installation of new systems, enhancements, and modifications using one or more of the following: C, C++, J2EE, Java, Servlets, JSP, EJB, Perl-CGI, HTML, CSS, XML, XSLT, Web Services, Oracle 9i, SQL, Server, MS IIS, Apache Tomcat Web Server, IBM WebSphere, BEA WebLogic, Citrix, VMWare, WinRunner, LoadRunner, Rational Team Test, SILK, TOAD, Visio, Dream Weaver, J Builder, Windows 9x/NT/2000/XP, Sun/Solaris-Unix and Linux.

The record also includes an LCA listing the beneficiary's work locations in Oakland, California and Cranbury, New Jersey as a systems analyst.

On August 17, 2005, the director requested additional evidence from the petitioner, including documentation of its past employment practices, an itinerary for the beneficiary, and copies of contractual agreements between the petitioner and its client for whom the beneficiary would be performing services, along with any work orders/service agreements.

In an October 26, 2005 response, counsel for the petitioner indicated that the petitioner provides consulting services to its clients, in-house and at its clients' offsite locations. Counsel also indicated that the petitioner is the beneficiary's employer and "would control the beneficiary's worksite location, performance, and supervise services rendered to the Petitioner's clients." As supporting evidence, counsel submitted various redacted contractor services agreements and service contracts.

The director denied the petition on February 3, 2006 finding that the altered/redacted contracts submitted by the petitioner did not provide specific information regarding the contracts with its clients, and thus did not establish that there was a specialty occupation position available for the beneficiary. The director found that without such contracts, it was not clear who had control over the beneficiary's work or duties.

On appeal, counsel stated that the petition was denied in error and that the petitioner controlled the beneficiary at all times. Counsel did not submit any supporting documentation.

Preliminarily, the AAO notes that the contractor services agreements and service contracts between the petitioner and its clients call for the petitioner to provide competent and skilled individuals to perform assignments including, but not limited to, programming, software maintenance, systems analysis, design, software analysis, project analysis, project management, and consulting. The AAO further finds that the evidence of record is sufficient to establish that the petitioner will act as the beneficiary's employer in that it

will hire, pay, fire, supervise, or otherwise control the work of the beneficiary as set out in the undated employment agreement between the beneficiary and the petitioner.¹ See 8 C.F.R. § 214.2(h)(4)(ii).

The Aytes memorandum cited at footnote 1, indicates that the director has the discretion to request that the employer who will employ the beneficiary in multiple locations submit an itinerary. Upon review, the director properly exercised his discretion to request additional information regarding the beneficiary's ultimate employment as the LCA submitted showed that the beneficiary would be working in two locations. Although the AAO declines to find that the petitioner is acting as the beneficiary's agent, the petitioner in this matter is employing the beneficiary to work for its clients or its clients' clients, and thus can be described as an employment contractor.

The court in *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000) held that for the purpose of determining whether a proffered position is a specialty occupation, a petitioner acting as an employment contractor is merely a "token employer," while the entity for which the services are to be performed is the "more relevant employer." The *Defensor* court recognized that evidence of the client companies' job requirements is critical where the work is to be performed for entities other than the petitioner. The court held that the legacy Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services.

When a petitioner is acting as an employment contractor, the entity ultimately using the alien's services must submit a detailed job description of the duties that the alien will perform and the qualifications that are required to perform the job duties. From this evidence, CIS will determine whether the duties require the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree, or its equivalent, in the specific specialty as the minimum for entry into the occupation as required by the Act.

In this matter, the petitioner in its June 15, 2005 letter provided a general description of the proposed systems analyst duties. The petitioner, however, must detail its expectations of the proffered position and must provide evidence of what the duties of the proffered position entail on a daily basis. In circumstances where the beneficiary will provide services to a third party, the third party must also provide details of its expectations of the position. Such descriptions must correspond to the needs of the petitioner and/or the third party and be substantiated by documentary evidence. To allow otherwise would require acceptance of any petitioner's generic description to establish that its proffered position is a specialty occupation. CIS must rely on a detailed, comprehensive description demonstrating what the petitioner expects from the beneficiary in relation to its business and what the third party contractor expects from the beneficiary in relation to its business and

¹ See also Memorandum from Michael L. Aytes, Assistant Commissioner, INS Office of Adjudications, *Interpretation of the Term "Itinerary" Found in 8 C.F.R. 214.2(h)(2)(i)(B) as it Relates to the H-1B Nonimmigrant Classification*, HQ 70/6.2.8 (December 29, 1995).

what the proffered position actually requires, in order to analyze and determine whether the duties of the position require a baccalaureate degree in a specialty.²

The petitioner does not provide substantive evidence that the duties of the proffered position incorporate the theoretical and practical application of a body of highly specialized knowledge that requires the attainment of a bachelor's degree or higher degree in the specific specialty or its equivalent as a minimum for entry into the occupation in the United States. Only a detailed job description from the entity that requires the alien's services will suffice to meet the burden of proof in these proceedings. *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

In this matter, without a comprehensive description of the beneficiary's actual duties from the entity utilizing the beneficiary's services, the AAO is precluded from determining whether the offered position is one that would normally impose the minimum of a baccalaureate degree in a specific specialty. Accordingly, the petitioner has not established the proffered position as a specialty occupation under 8 C.F.R. § 214.2(h)(iii)(A)(1).

In that the record does not offer a comprehensive description of the duties the beneficiary would perform for the petitioner's clients, the petitioner is also precluded from meeting the requirements of the three remaining alternate criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). Without a meaningful job description, the petitioner may not establish the position's duties as parallel to any degreed positions within similar organizations in its industry or distinguish the position as more complex or unique than similar, but non-degreed, employment, as required by alternate prongs of the second criterion. Absent a detailed listing of the duties the beneficiary would perform under contract, the petitioner cannot establish that it previously employed degreed individuals to perform such duties, as required by the third criterion. Neither can the petitioner satisfy the requirements of the fourth criterion by distinguishing the proffered position based on the specialization and complexity of its duties.

Upon review of the totality of the record, the record fails to reveal sufficient evidence that the offered position requires a bachelor's degree, or its equivalent, in a specific discipline. Accordingly, it is concluded that the petitioner has not demonstrated that the offered position is a specialty occupation within the meaning of the regulations.

Finally, the AAO will address the director's conclusion that the petitioner did not establish that it has complied with the terms of the LCA.

² The AAO observes that the Department of Labor's *Occupational Outlook Handbook* reports that there is no universally accepted way to prepare for a job as a systems analyst, although most employers place a premium on some formal college education.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(B), the petitioner shall submit the following with an H-1B petition involving a specialty occupation:

1. A certification from the Secretary of Labor that the petitioner has filed a labor condition application with the Secretary,
2. A statement that it will comply with the terms of the labor condition application for the duration of the alien's authorized period of stay,
3. Evidence that the alien qualifies to perform services in the specialty occupation. . . .

The LCA, which lists the work locations as Oakland, California and Cranbury, New Jersey, is not valid. The letter of support filed with the petition indicates that the beneficiary will work both on-site and off-site. As the record does not contain an itinerary for the beneficiary and the contracts submitted by the petitioner have been redacted, it is not clear that the beneficiary would be working within the geographical area covered by the LCA. To the extent that beneficiary would provide services outside of Oakland, California and Cranbury, New Jersey, the work would not be covered by the locations specified on the LCA. For this additional reason, the petition may not be approved.

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

Accordingly, the AAO shall not disturb the director's denial of the petition.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed. The petition is denied.